STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 289343 Oakland Circuit Court
MALINI RAO, Defendant-Appellant.	LC No. 2008-219989-FH

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

MURRAY, P.J. (*dissenting*).

The majority holds that the trial court abused its discretion in denying defendant's motion for a new trial. The majority therefore vacates the order and remands for an evidentiary hearing on whether this new evidence makes a different result probable on retrial. Central to its holding is the conclusion that the May 6, 2009, x-ray and radiology report, as well as the June 11, 2009, supplemental report of Dr. Rothfeder, met the "newly discovered evidence" test most recently articulated in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003). With all due respect to my colleagues, I disagree with this conclusion and would instead hold that the learned trial judge did not abuse her discretion, and would therefore affirm.

I. THE MAJORITY'S DECISION

A. NEWLY DISCOVERED EVIDENCE

The trial court denied defendant's motion for a new trial based on newly discovered evidence, a decision that we review for an abuse of discretion. *Cress*, 468 Mich at 691. A trial court abuses its discretion when its decision falls outside the range of principled outcomes, *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008), and a "mere difference in judicial opinion does not establish an abuse of discretion." *Cress*, 468 Mich at 691. Importantly, the abuse of discretion standard recognizes that the trial court is optimally situated to decide the weight to give matters that have occurred in its presence. *People v Babcock*, 469 Mich 247, 267-268; 666 NW2d 231 (2003).

The majority opinion concludes that the 2009 x-ray radiology report and letter ("2009 exhibits") constitute newly discovered evidence warranting a new trial. As recognized by the majority,

> [f]or a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. *Cress*, 468 Mich at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

As discussed below, the trial court did not abuse its discretion in concluding that the 2009 exhibits were not newly discovered.

In order for the 2009 exhibits to be considered newly discovered evidence, they would have to have been in existence at the time of trial. This conclusion is compelled by *Cress*, the dictionary and analogous federal and state case law on this subject.

In *Cress*, the Supreme Court emphasized that for evidence to be "newly discovered" the party could not have with reasonable diligence discovered it and produced it at trial. *Cress*, 468 Mich at 692. Certainly this test envisions that the evidence sought to be introduced existed at the time of trial, otherwise there would be no sense in having a requirement that a party show that even with due diligence, the evidence could not have been located and used at trial. See, e.g., *Peacock v Board of Sch Comm'rs*, 721 F2d 210, 214 (CA 7, 1983) (under analogous federal rule, the court held that the rule requiring evidence to exist at the time of trial was "subsumed in the 'due diligence' requirement; diligence is an issue only if there is evidence to be unearthed."). In other words, no amount of due diligence could ever uncover nonexistent evidence, so the due diligence requirement presumes the evidence existed at the time of trial. Just recently our Court recognized that there is a distinction between "newly available evidence" and "newly discovered evidence sufficient to warrant a new trial." *People v Terrell*, ___ Mich App ___, ___; ___ NW2d ___ (2010), slip op at 5. The majority opinion is mistaken in concluding that no Michigan case requires the evidence to exist at the time of trial.

Black's Law Dictionary also defines the phrase "newly discovered evidence," which has a peculiar legal meaning. *Vodvarka v Grasmeyer*, 259 Mich App 499, 510; 675 NW2d 847 (2003). According to that source, newly discovered evidence is "evidence existing at the time of . . . trial but then unknown to a party, who, upon later discovering it, may assert it as grounds for . . . a new trial." Black's Law Dictionary (7th ed). The typical newly discovered evidence case arises where potentially critical evidence is found after trial, for example when documents are found for the first time after trial in an existing police file. See *People v George*, ___ Mich ___; 788 NW2d 655 (2010) (CORRIGAN, joined by YOUNG, J, dissenting).

Case law from our sister states and the federal courts, applying the same or substantially similar test as outlined in *Cress*,[1] have likewise concluded that evidence created after trial does

[1] In *People v Terrell*, ___ Mich App at ___, our Court recently noted that the test used by federal courts under Fed R Crim P 33 [and, we add Fed R Civ P 60] "essentially mirrors the test for a new trial based on newly discovered evidence that our Supreme Court articulated in *Cress*." *Terrell*, slip op at 5. See, also, *United States v Hall*, 324 F3d 720, 723 n 5 (CA DC, 2003) (continued…)

not constitute "newly discovered evidence" for purposes of a motion for new trial, because the evidence did not exist at the time of trial. See, e.g., *United States v Hall*, 324 F3d 720, 723 (CA DC, 2003) (under Rule 33, events occurring after trial "would have no effect on the trial's outcome and should not be the basis for vacating the conviction."), citing both *United States v Bolton*, 355 F2d 453, 461 (CA 7, 1965), and *United States v Welch*, 160 F Supp 2d 830, 833 (ND Ohio, 2001); *United States v DePugh*, 266 F Supp 417, 434 (WD Mo, 1967), rev'd on other grounds 401 F2d 346 (CA 8, 1968); *Grissom v State*, 572 NW2d 183, 184 (Iowa App, 1997) ("[B]y definition, newly discovered evidence refers to evidence which existed at the time of the trial proceeding."); *State v Sanchez*, 200 Ariz 163, 166-167; 24 P3d 610 (2001); *State v Faulkner*, 1 Haw App 651, 656-657; 624 P2d 940 (1987) ("Implicit in the court's established criteria is the well-settled notion that the newly discovered evidence upon which the motion for new trial is based must be evidence consisting of facts that were in existence and hidden at the time of trial.").

The majority concludes that even if there were a requirement that the evidence be in existence at the time of trial, the 2009 exhibits still meet this standard. Relying upon *People v LoPresto*, 9 Mich App 318; 156 NW2d 586 (1967) and *People v Burton*, 74 Mich App 215; 253 NW2d 710 (1977), the majority opinion concludes that the 2009 exhibits are newly discovered because defendant and her counsel did not know the victim's rib condition at the time of trial. This argument misses the point of this rule. Cleary defendant and her attorney knew there was an issue about the condition of the victim's ribs, as that was a main issue in the trial. The question to be decided is whether the evidence sought to be introduced, here the 2009 exhibits, are allegedly new.

This brings me to the related, but better argument raised by the majority opinion. That is, it is only the "facts," rather than the "evidence" that need to exist at the time of trial, and certainly the victim's rib condition existed at the time of trial. Although the majority opinion cites no law for this proposition, some does exist. See, e.g., *Lans v Gateway 2000 Inc*, 110 F Supp 2d 1, 4 (D DC, 2000), aff'd 252 F3d 1320 (Fed Cir, 2001), relying upon *Nat'l Anti-Hunger Coalition v Executive Comm of the President's Private Sector Survey of Cost Control*, 711 F2d 1071, 1075 n 3 (CA DC, 1983).[2] In any event, the better line of reasoning is that contained in the cases previously cited,[3] which holds that if the evidence sought to be admitted did not exist (so that it could be "discovered" with "due diligence") at the time of trial, it does not constitute newly discovered evidence.[4]

(…continued)

(recognizes newly discovered evidence test under Fed R Crim P 33 is same as under Fed R Civ P 59 and 60.).

[2] *Lans* is not particularly helpful because the evidence at issue in that case—a contract—existed at the time of trial. *Lans*, 110 F Supp 2d at 4-5.

[3] The majority opinion distinguishes these cases on the facts. But, the cases were cited for the principles articulated in the opinions, not because they were factually analogous.

[4] The majority opinion's analogy to submitting DNA testing from clothing that existed at trial falls short. For one, a statute governs use of DNA testing in new trial motions. MCL 770.16. Additionally, the DNA test of a specimen would be the same whether it was tested at trial or

(continued…)

In addition, the 2009 exhibits do not reflect facts in existence at the time of trial. Instead, they reflect the condition of the victim's ribs some ten months *after* the trial. Nothing within the 2009 exhibits reveals the condition of the ribs at the time of trial. Thus, even under the majority's rationale, this evidence should not be considered newly discovered.

Here, of course, it is undisputed that the 2009 exhibits were not in existence at the time of trial. Instead, they were created almost a year later, and thus were not discoverable through any level of diligence at the time of trial. This evidence does not meet the newly discovered evidence test under *Cress*, and the trial court's ruling to that effect was not an abuse of discretion.

Additionally, the trial court did not abuse its discretion when it concluded that this same evidence—even if it was newly discovered—was both cumulative and would not have made a different result probable on retrial. The evidence discussed below, all of which was produced during trial, supports this conclusion.

In the survey report, Dr. Donald Gibson noted irregularities to the child's seventh, eighth, and possibly tenth ribs and sclerotic edges on her eighth rib. Dr. Gibson opined that the rib irregularities "may be due to old fractures." In the opinion letter, Dr. Robert Rothfeder claimed that the skeletal survey confirmed that the child most likely suffered from metabolic bone disease when she came to the United States from India. Dr. Rothfeder also claimed that, based on the survey, the alleged injuries to the seventh and eighth ribs were anomalies, rather than fractures. He reasoned that if the findings observed in 2007 resulted from trauma, the survey would have shown radiologic healing or "remodeling" of the ribs. Dr. Rothfeder concluded that the seventh and eighth ribs showed anomalies caused by a continuing metabolic bone disease. He further stated that the fact that the survey did not show an anomaly regarding the eleventh rib suggests that the eleventh rib did remodel but did not suggest that a traumatic fracture occurred. Rather, he opined that the seventh and eighth ribs showed metabolic bone disease, which could have explained the fragility of the eleventh rib. Thus, Dr. Rothfeder indicated that the eleventh rib evidenced remodeling or healing. Rather than evidencing a traumatic fracture, however, Dr. Rothfeder opined that the eleventh rib may have been fragile because of metabolic bone disease, which he claimed was responsible for the appearance of the seventh and eighth ribs.

The 2009 exhibits offered by defendant are cumulative of the trial testimony and do not make a different result probable on retrial. During trial, Dr. Rothfeder testified that the child's seventh and eighth ribs did not appear fractured because "there was not a break in the bone." Rather, he maintained in the letter—as he did at trial—that they evidenced abnormalities resulting from metabolic bone disease. Hence, defendant's new evidence only reinforces Dr. Rothfeder's opinion expressed during trial that the child suffered from metabolic bone disease rather than nonaccidental trauma. In addition, Dr. Gibson opined that the rib irregularities evidenced in the May 2009 skeletal survey may have resulted from old fractures. Thus, defendant's new evidence shows only that the condition of the child's ribs may have resulted from accidental trauma, nonaccidental trauma, or from a metabolic abnormality. The jury

(…continued)

afterward. Not so with ribs that are weak, diseased, or fractured.

decided this question based on these same competing theories and evidence in the prosecution's favor during trial.

The majority opinion also fails to acknowledge the other evidence presented to the jury in support of the charges. However, the trial court—who of course presided over both the criminal trial and the abuse and neglect case[5]—recognized both the other evidence implicating defendant in causing the child's injuries and the cumulative nature of the 2009 evidence. In its thorough and well-written opinion, the trial court stated:

> While the prosecution admits that there was minimal direct evidence that defendant caused [the child's] injuries, the circumstantial evidence and reasonable inferences arising from the evidence support the jury's verdict. Specifically, the Children's Protective Services worker testified that defendant admitted to beating [the child] about the face and that defendant demonstrated the beating by raising her hand over her shoulder and hitting a chair with an open hand three times in a forceful swing. Defendant's oldest daughter . . . testified that defendant hit [the child] with a back scratcher when she pooped her pants, that when [the child] got into trouble she would be "beat" by mother, and that on one occasion, defendant put duct tape on [the child's] mouth because she was being too loud.
>
> * * *
>
> Exhibits J, K and L do not support the defendant's argument that the evidence is noncumulative material. During the trial, Dr. Rothfeder testified that although he saw no acutely broken ribs, there were findings that may have represented healing fractures, therefore when bones are healing they can be sclerotic. Dr. David Kellam, testified that additional x-rays, from the time of removal from the parents home to the present day, would only be helpful in evaluating the child if she is found to be active and then developed further fractures, thereby supporting the theory that the fractures are secondary to mild trauma, like falling or running into things. The newly submitted report by Dr. Gibson indicates that the bilateral rib fractures may be due to old fractures and he found no evidence on the films to suggest a metabolic bone disease. Based on Dr. Kellam's testimony and Dr. Gibson's new report, the court does not find that Exhibits J, K and L are noncumulative material newly discovered evidence that would make a different result probable at retrial. The expert witness testimony evidence presented by the prosecution at trial negated defendant's theory that the injuries were accidental and ruled out all other causes for the injuries other than child abuse. Defendant's claims do not support appellate reversal of the conviction or that the verdict has resulted in a miscarriage of justice.

[5] Reference to the abuse and neglect case is not to suggest the trial court considered evidence from that case in the instant case. Rather, its reference is to point out how familiar the trial court was with the circumstances of this case.

The trial court's opinion is supported by the record evidence—indeed, the court cites to record evidence in making its findings. There is no suggestion that it made a legal error in its ruling. Consequently, under the applicable standard of review, it should be affirmed.

In reversing the trial court's order, the majority opinion recognizes that the medical experts had varying opinions on whether the child's 2007 x-rays revealed rib fractures or anomalies. The majority concludes, nevertheless, that the 2009 exhibits—which only buttressed what defendant's experts had already testified to at trial—is so factually compelling that it warrants a new trial. The trial court did not think so, nor did defendant's expert Dr. Kellam, who, as noted by the trial court, testified that x-rays more recent than these used at trial (November 2007) would not provide additional proof on his theory of the rib anomalies. To conclude as the majority opinion does ignores the well-entrenched standard of deference to a trial court's ruling on a motion for new trial, *Cress*, 468 Mich at 691, and results from application of a de novo review of the decision. The only difference between the trial court's opinion and that of the majority is the weight or significance to be given to the 2009 exhibits. In other words, the majority opinion only represents a different judicial view of the facts, and nothing more. *Id*.

For all of these reasons, I would affirm the conviction and sentence.

/s/ Christopher M. Murray